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No. 04-679

IN THE SUPREME COURT OF THE UNITED STATES

BILL LOCKYER, Attorney General, State of California, *Petitioner,*

v.

ROBERT E. KENNEDY, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Following *Britt v. North Carolina*, 404 U.S. 226 (1971), the California Supreme Court ruled that an indigent defendant is presumptively entitled to a complete record of all prior proceedings in the event of a trial following a mistrial, and that a total denial of any such records constitutes "structural error," reversible per se. *People v. Hosner*, 15 Cal. 3d 60, 538 P.2d 1141, 123 Cal. Rptr. 381 (1975) (*Hosner*). On appeal of a conviction following respondent Kennedy's retrial, the state court of appeal ruled that the trial court erred under *Hosner* in providing Kennedy only transcripts of witness testimony in the prior trial. Reasoning that the trial court had "substantially complied" with *Hosner* by providing transcripts of witness testimony, the state appellate court concluded that a harmless-error test applied. Evaluating the error for prejudice under *Chapman v. California*, 386 U.S. 18 (1967) (*Chapman*), the state appellate court found the error harmless beyond a reasonable doubt.

On appeal of the district court's denial of Kennedy's petition for writ of habeas corpus, a divided panel of the Ninth Circuit Court of Appeals, in an opinion authored by Judge Stephen Reinhardt, ruled that the state appellate court's approach to its finding of trial court error was "contrary to" and "an unreasonable application" of *Britt v. North Carolina*, because this Court has not recognized a "substantial compliance" qualification to *Britt's* substantive requirement. However, the Ninth Circuit agreed that where the state fails to provide only a portion of the prior transcript, a harmless-error test applies. Without examining the state appellate court's application of the *Chapman* harmless error test, the Ninth Circuit proceeded to apply its own harmless-error inquiry under *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (*Brecht*).

In *Mitchell v. Esparza*, 540 U.S. 12, 18 (2003), this Court held that a federal court may not grant habeas relief, "if the state court simply erred in concluding the State's errors were harmless; rather, habeas relief is appropriate only if the [State] Court of Appeals applied harmless-error review in an 'objectively unreasonable' manner."

Accordingly, the question presented is:

1. If a state appellate court arguably misapplies this Court's precedent in an analysis that nonetheless results in a *correct* finding of constitutional error and a *correct* decision to review that error for lack of prejudice beyond a reasonable doubt under *Chapman*, may a federal court grant habeas corpus relief by engaging in an independent harmless-error determination under *Brecht*, without first determining that the state court's harmless-error conclusion was "objectively unreasonable"?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 04-

BILL LOCKYER, Attorney General, State of California, *Petitioner,*

v.

ROBERT E. KENNEDY, *Respondent.*

Bill Lockyer, Attorney General of the State of California [hereinafter the State], respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The amended slip opinion of the Ninth Circuit, No. 01-55246 (August 18, 2004), which is reported at 2004 Daily Journal Daily Appellate Report 10236, is contained in Appendix (App.) A. The slip opinion of the Ninth Circuit, No. 01-55246 (June 14, 2004), which was reported at 372 F.3d 1013 (2004), is contained in App. C. The unreported order of the District Court is contained in App. D. The unreported Report and Recommendation of the Magistrate Judge is contained in App. E. The unreported slip opinion of the California Court of Appeal, Fourth Appellate District, Division One (hereinafter state appellate court), case no. D027718 (September 8, 1998) is contained in App. F.

STATEMENT OF JURISDICTION

The amended opinion of the United States Court of Appeals for the Ninth Circuit was filed on August 18, 2004. App. A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION, STATUTES, OR REGULATIONS

Section 1 of the Fourteenth Amendment states, in pertinent part, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 2254(a), provides in relevant part that a federal court may entertain a habeas corpus application "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(d), part of the AEDPA, Pub. L. No. 104-132, Stat. 1214, 28 U.S.C. § 2244, et seq., provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the State court proceeding.

STATEMENT OF THE CASE

Police Detective McDowell was working an undercover narcotics operation in an area of San Diego known for rock cocaine sales. McDowell saw Kennedy and another person, Randall Tucker, across the street. McDowell made eye contact with Kennedy and nodded his head to indicate that he was asking if Kennedy was selling a controlled substance. Kennedy gestured for McDowell to cross the street.

McDowell approached the two men and asked, "Are you serving?", meaning in street terminology "are you selling a controlled substance?" Subsequently, Tucker responded, "What do you want?" McDowell said he wanted a "2-0," which in street terminology means $20 of rock cocaine or another controlled substance. Kennedy asked for money, and McDowell took a $20 bill from his pocket and gave it to Kennedy. Kennedy put the bill in his pocket and said to Tucker, "Give it to him, cuz." Tucker walked to a nearby fence, picked up a paper bag, and handed it to McDowell. The paper bag contained pieces of an off-white, rock-like substance.

McDowell told Tucker it was not enough and asked him either to give more or return part of his money. Kennedy told McDowell to come back later. Tucker asked McDowell if he was a police officer and McDowell walked away. Police arrested Kennedy and Tucker. In Kennedy's pocket they found a $20 bill with numbers which has been previously recorded by the police. The paper bag contained .08 grams of an uncontrolled substance. App. E at 122a-123a; App. F at 150a-151a.

Kennedy's first jury trial ended when the jury deadlocked and the court declared a mistrial. At the close of that trial, Kennedy's defense attorney requested a transcript be prepared. When the trial court ordered preparation of the trial testimony

only, Kennedy's attorney stated, "that's fine." Later, 1996, the trial court granted Kennedy's request to proceed in pro per and appointed advisory counsel to assist him at trial. Ten days later, the trial court ascertained the trial testimony had been transcribed and given to Kennedy. Kennedy requested a more complete transcript, including motion hearings, opening statements, and closing arguments and stated he generally needed the materials to prepare for retrial. The trial court denied Kennedy's request. A month later, just before the second trial, Kennedy relinquished his right to represent himself and the court appointed his advisor as trial counsel. App. E at 128a-129a, 131a n.4; App. F at 152a.

Kennedy's second trial concluded with a guilty verdict for selling a substance in lieu of a controlled substance (Cal. Health & Safety Code § 11355 (West 2004)). In a bifurcated hearing, the court also found true two no probation prior convictions (Cal. Penal Code § 1203(e)(4)), two prison prior convictions (Cal. Penal Code § 667.5(b)), and two prior serious or violent felony convictions or "strikes" (Cal. Penal Code § 667(b)-(i)). Kennedy had been convicted in 1981 for forcible rape with a deadly weapon, and in 1985 for voluntary manslaughter. The trial court sentenced Kennedy to a state prison term of twenty-five years-to-life (Cal. Penal Code §§ 667(e)(2) and 1170.12(c)(2)). App. E at 124a; App. F at 149a.

The state appellate court, affirmed the judgment. App. E at 149a. On direct appeal, Kennedy argued the judgment must be automatically reversed because his right to equal protection was violated when the trial court denied him a transcript of his first trial that included all motions, opening statements and closing arguments. App. F at 150a, 152a. The state appellate court noted that, in *Hosner*, 15 Cal. 3d at 64, the California Supreme Court held that an indigent criminal defendant is presumed to have need of a transcript of prior proceedings to present an effective defense. Further, the *Hosner* court stated that, "the

erroneous denial of an indigent defendant's motion for a free transcript of a prior trial requires automatic reversal." App. F at 153a (quoting *Hosner*, 15 Cal. 3d at 70).

The state appellate court determined that, assuming Kennedy's request for the additional portions of the transcript was timely, the trial court should have provided it. The appellate court, however, did not hold that such a denial was reversible error. In contrast to *Hosner*, where the indigent criminal defendant was entirely denied a transcript of the prior proceedings, the appellate court held the trial court "substantially complied" with *Hosner* because Kennedy was afforded a free transcript of all the testimony at his first trial. The appellate noted that, as suggested in *Hosner*, Kennedy had available all those portions of the transcript which might have been necessary to impeach witnesses or to rebut evidence at the retrial. The state appellate court declined "to require per se reversal when, with defense counsel's acquiescence, the court provides an indigent defendant a transcript of all the trial testimony, but denies a later request for the additional portions of the transcript." App. F at 153a.

The state appellate court also found that Kennedy had not shown that the trial court's denial of his request for the additional portions of the transcript was prejudicial. As an example of prejudice, Kennedy indicated that, prior to his first trial, his defense counsel requested that if Kennedy's statement to a police officer Mendez were mentioned, any gang reference be excised. Defense counsel asked that the prosecutor admonish Mendez not to "blurt it out" on the witness stand. The prosecutor stated that such was his intention and he had mentioned it to Mendez. He noted that this evidence could become relevant if Kennedy and Tucker minimized their relationship with each other. The trial court ruled gang membership would not be mentioned, unless it became relevant during trial. On retrial, Officer Mendez did not testify.

Detective McDowell, however, testified that after he gave Kennedy the $20, Kennedy said to Tucker, "Give it to him, cuz" and explained the term "cuz" was used by a lot of people, "but basically [by] gang members and those that [sic] want to be gang members." The prosecutor then questioned McDowell and suggested, as an alternative, that the term was used to refer to a person from one's own neighborhood, and McDowell agreed. The state appellate court concluded that the allusion to gang membership was not significant to the verdict and Kennedy had not shown prejudice. App. F at 153a-154a.

Kennedy filed a federal habeas corpus petition in the United States District Court for the Southern District of California. App. E at 125a. A United States magistrate judge reviewed Kennedy's claim that the trial court violated his right to equal protection when it refused to provide him with a complete transcript of his first trial. App. E at 128a-132a. The court analyzed Kennedy's claim under the AEDPA standard and denied habeas corpus relief because Kennedy failed to demonstrate that the state appellate court's decision was contrary to, or an unreasonable application of, clearly established Supreme Court law as set forth in *Britt*. App. E at 131a, 132a.

In denying Kennedy's claim, the magistrate judge stated:

> There is no dispute that [Kennedy] was entitled to at least some portion of the transcript of the first trial. Indeed, the trial court recognized [Kennedy's] constitutional right to a transcript and provided him with a transcript of all testimony from the first trial. The issue is whether clearly established Supreme Court law requires that the State have provided [Kennedy] with a *complete* trial transcript, including all motion hearings, opening statements, and closing arguments.

> As noted by the state appellate court, the trial court provided [Kennedy] with a complete transcript of the trial testimony. Thus, the state appellate court concluded that [Kennedy] had available all those portions of the transcript which might have been necessary to impeach witnesses or to rebut evidence at the retrial. *See People v. Kennedy*, No. D027718, unpublished slip op. at 6. App. E at 130a-131a.

The magistrate judge noted that Kennedy failed to allege that the denial of his request for a transcript of motion hearings, opening statements, or closing arguments prejudiced him in any way. Accordingly, the magistrate judge found that, even if the trial court erred in failing to provide Kennedy with the entire transcript of his first trial, any such error was harmless beyond a reasonable doubt. App. E at 132a.

The magistrate judge recommended dismissal of the petition (App. E at 147a), and the district court adopted the magistrate's recommendation (App. D at 118a). The district court granted a certificate of appealability, in part, that included the following claim: "whether denial of a transcript of pretrial proceedings and motions in limine was a denial of [Kennedy]'s rights and whether it was harmless error." App. D at 119a (emphasis added).

Kennedy appealed the district court's dismissal of his habeas corpus petition, maintaining his right to due process and equal protection had been violated when the state trial court denied his request for a full transcript of his first trial. App. C at 70a. Kennedy argued, however, that the failure to provide him with the entire transcript of his first trial was structural error. App. C at 91a n.15, and at 107a.

Writing for a majority panel of the Ninth Circuit Court of Appeals, Judge Stephen Reinhardt concluded that this Court's

cases clearly establish that, on retrial, an indigent criminal defendant "must be provided with a transcript of prior proceedings which includes, among other things, motions and the court's rulings thereon, opening statements, closing arguments, jury instructions and relevant colloquies." App. A at 19a; App. C at 82a. The Ninth Circuit concluded that the state appellate court's decision was contrary to this Court's established precedent because the state appellate court created a doctrine of "substantial compliance" which added an additional factor to *Britt* (App. C at 83a-84a, 87a), or alternatively that it was an unreasonable application of *Britt* (App. C at 88a-89a n.13.), and that denying Kennedy a "full transcript" of the prior proceedings for use in relation to his second trial was "substantial and injurious" under *Brecht*. App. C at 97a. The majority reversed the district court's denial of Kennedy's habeas corpus petition and remanded the matter for issuance of the writ. App. C at 98a.

Respondent filed a petition for panel rehearing and petition for rehearing en banc. App. B at 57a. The Ninth Circuit voted to deny the petition; the dissent voted to grant the petition. An amended opinion was filed on August 18, 2004. App. A at 6a.

REASONS FOR GRANTING THE WRIT

The petition for writ of certiorari should be granted to make clear that under AEDPA a state court's finding under *Chapman v. California*, 386 U.S. 18 (1967) that federal constitutional error is harmless is itself entitled to deferential habeas review and to limit federal habeas corpus relief to the case in which a state court's harmless-error review of a constitutional violation under *Chapman* is either "contrary to" or "objectively reasonable."

In order to reach its published holding reversing a twenty-five years to life sentence under California's Three Strikes Law in

the instant case, the Ninth Circuit found it necessary to hold the state appellate court's decision, which is consistent with Ninth Circuit precedent itself, was both "contrary to" and an "unreasonable application of" this Court's precedent, and then ignore the state appellate court's harmless-error analysis under *Chapman* and engage in independent review under *Brecht*.

AEDPA requires that deference be given to state court adjudications. There is no reason that this deference should stop at the state court's adjudication of whether a constitutional violation occurred, and not be applied to the state court's determination that such a violation was harmless. Yet, when a federal court conducts its own independent review under *Brecht*, as did the Ninth Circuit in the present case, that is precisely what occurs. Nothing in *Brecht* requires a federal court to give deference to, let alone consider, a state court's harmless error analysis. This lack of consideration violates the principles of comity and federalism upon which AEDPA was based. *See Williams v. Taylor*, 529 U.S. 362, 436 (2000) ("AEDPA's purpose [was] to further principles of comity, finality, and federalism. There is no doubt Congress intended AEDPA to advance these doctrines.").

The Ninth Circuit's decision also contravenes this Court's rule in *Mitchell v. Esparza*, that a state court's finding that constitutional error is harmless should be evaluated under the AEDPA deference standard of 28 U.S.C. § 2254(d). In *Mitchell*, this Court stated that "a constitutional error is harmless when 'it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."'" *Mitchell v. Esparza*, 540 U.S. at 17-18, citing *Neder v. United States*, 527 U.S. 1, 15 (1999) (quoting *Chapman v. California*, 386 U.S. at 24); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). This Court then stated that a federal court may not grant habeas relief "if a state court simply erred in concluding the State's errors were harmless;

rather, habeas relief is appropriate only if the [State] Court of Appeals applied harmless-error review in an 'objectively unreasonable' manner." *Mitchell v. Esparza*, 540 U.S. 12 at 18, citing *Lockyer v. Andrade*, 538 U.S. 63, 75-77 (2003); *see also Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam); *Williams v. Taylor*, 529 U.S. at 410 (An "*unreasonable* application of federal law is different from an *incorrect* application of federal law").

Reversal by this Court is appropriate because the Ninth Circuit obviously committed error by ignoring the state appellate court's conclusion that any error in not supplying Kennedy with a "complete transcript" was harmless beyond a reasonable doubt under *Chapman v. California*. This Court's supervisory power is again needed because of the Ninth Circuit's failure to adhere to AEDPA's strict limitations on the scope its collateral review of state court constitutional adjudications. *See* Sup. Ct. R.10(a); *see also Middleton v. McNeil*, 541 U.S. ___, 124 S. Ct. 1830, 158 L. Ed. 2d 701 (2004) (*per curiam*), *rev'g* 344 F.3d 988 (9th Cir. 2003); *Yarborough v. Gentry*, 540 U.S. 1 (2003) (*per curiam*), *rev'g Gentry v. Roe*, 320 F.3d 891 (9th Cir. 2002); *Woodford v. Visciotti*, 537 U.S. at 19 (*per curiam*), *rev'g* 288 F.3d 1097 (9th Cir. 2002); *Early v. Packer*, 537 U.S. 3 (2002) (*per curiam*) *rev'g Packer v. Hill*, 291 F.3d 569 (9th Cir. 1992). Once again, the Ninth Circuit's decision is "nowhere close to the mark," *Yarborough v. Alvarado*, 541 U.S. ___, 124 S. Ct. 2140, 2150, 158 L. Ed. 2d 938 (2004) *rev'g Alvarado v. Hickman*, 316 F.3d 841 (9th Cir. 2004).

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S FAILURE TO DEFER TO THE STATE COURT'S HARMLESS-ERROR ANALYSIS UNDER *CHAPMAN V. CALIFORNIA*, ITSELF, VIOLATES THE LIMITS CONGRESS IMPOSED, THROUGH AEDPA, ON FEDERAL HABEAS CORPUS RELIEF AND ALSO CONTRAVENES THIS COURT'S PRECEDENT

In the present case, the Ninth Circuit independently reviewed the record to conclude under *Brecht*, that the denial of a complete record to Kennedy had a "substantial and injurious effect of the jury's verdict." App. C at 90a. The Ninth Circuit never analyzed whether the state appellate court's harmless-error analysis under *Chapman v. California* (App. F at 153a-154a), was objectively unreasonable as required by this Court's rule in *Mitchell v. Esparza*, 540 U.S. at 18. In a rehearing petition, the State argued that the Ninth Circuit failed to follow *Mitchell* and its prescription that a state court's harmless error analysis be evaluated under AEDPA's deference standard. App. B at 59a, 65a. Nevertheless, the Ninth Circuit's modified opinion remained essentially unchanged and disregarded this Court's rule in *Mitchell v. Esparza*. App. A at 27a.

Certiorari review should be granted because there is no reason that AEDPA deference should stop at the state court's adjudication of whether a constitutional violation occurred, and not be applied to the state court's rationale in finding that a constitutional violation was harmless under *Chapman*. However, if a federal court on habeas corpus conducts its own independent review under *Brecht*, as did the Ninth Circuit in the present case, a failure to give deference under AEDPA is precisely what occurs. Nothing in *Brecht* requires a federal court to give deference to, let alone consider, a state court's

harmless error analysis. This lack of consideration violates the principles of comity and federalism upon which AEDPA was based. *See Williams v. Taylor*, 529 U.S. at 436 ("AEDPA's purpose [was] to further principles of comity, finality, and federalism. There is no doubt Congress intended AEDPA to advance these doctrines.").

Also, this Court should grant certiorari to secure uniformity of decisions under AEDPA because federal courts of appeal have adopted varying approaches to the question whether a federal habeas court, in evaluating the harm of a constitutional violation, should review the reasonableness of the state court's application, if any, of *Chapman* or should independently determine the harmlessness of the error under *Brecht*. The Tenth Circuit has held that a habeas corpus court must first determine whether the state court's harmless error analysis was objectively unreasonable under the "unreasonable application" prong of 28 U.S.C. § 2254(d)(1) and if so, then determine whether the error was harmless under *Brecht*. *Cargle v. Mullin*, 317 F.3d 1196, 1220, 1224 (10th Cir. 2003); *see also Saiz v. Burnett*, 296 F.3d 1008, 1012-1013 (10th Cir. 2002) (holding that if the state court correctly applied *Chapman*, federal courts do not apply *Brecht* unless the state court's *Chapman* analysis violated AEDPA). In contrast, the Fifth and Sixth Circuits have held that a habeas court should determine the harmlessness of the error independently under *Brecht*. *Robertson v. Cain*, 324 F.3d 297, 306-307 (5th Cir. 2003); *Hill v. Hofbauer*, 337 F.3d 706, 718 (6th Cir. 2003), *citing Nevers v. Killinger*, 169 F.3d 352, 371-372 (6th Cir. 1999).

The Ninth Circuit recently held that "if a federal court applies a harmless error standard in the first instance, the *Brecht* standard governs." But when the state court has conducted a harmless error analysis, a federal court on habeas review must "first decid[e] whether the state court's harmless error analysis is objectively unreasonable and, if so, [then apply] *Brecht*."

Medina v. Hornung, 372 F.3d 1120, 1126 (9th Cir. 2004) (applying the approach taken by this Court in *Mitchell v. Esparza*, 540 U.S. at 17-18.) However, the Ninth Circuit later amended the decision to eliminate this portion of the opinion, and instead independently applied *Brecht*. *Medina v. Hornung*, ___ F.3d ___, 2004 Daily Journal D.A.R. 12127 (9th Cir. September 29, 2004). The Ninth Circuit's amendment of *Medina* occurred after the Ninth Circuit's amended opinion was filed in the instant case on August 18, 2004. App. A at 1a. Even after *Mitchell*, the Ninth Circuit suggested that independent review under *Brecht* continues as it did before AEDPA. *See Picazo v. Alameida*, 366 F.3d 971 (9th Cir. 2004).

In *Mitchell v. Esparza*, this Court held that where a state court conducted a harmless error review under *Chapman*, a federal court may not grant habeas relief without first concluding that the state court's application of *Chapman* was unreasonable: "We may not grant respondent's habeas petition, however, if the state court simply erred in concluding that the State's errors were harmless; rather, habeas relief is inappropriate only if the [state court] applied harmless-error review in an 'objectively unreasonable' manner." *Mitchell v. Esparza*, 540 U.S. at 18. Further, since 1999 when the Sixth Circuit authored *Nevers v. Killinger*, this Court has repeatedly emphasized, and given teeth to, the deference that is required under AEDPA. See, e.g., *Middleton v. McNeil*, 124 S. Ct. at 1832-1833; *Yarborough v. Alvarado*, 124 S. Ct. at 2149-2151; *Yarborough v. Gentry*, 540 U.S. at 4-6; *Lockyer v. Andrade*, 538 U.S. at 70-75; *Woodford v. Visciotti*, 537 U.S. at 21-26; *Early v. Packer*, 537 U.S. at 7-11; *Williams v. Taylor*, 529 U.S. at 436. It is now beyond dispute that it is *not* sufficient that a federal habeas court, in its "independent view," is left with the "firm conviction" that the state court ruling was erroneous. *Lockyer v. Andrade*, 538 U.S. at 75. "Objectively unreasonable" does not equate with "clear error": "The gloss of

clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *Id.*

The approach advocated by the Ninth Circuit and other circuits of the federal courts of appeal that a finding of constitutional error triggers an independent harmless-error review under *Brecht*, does not require the habeas court to give deference to, let alone consider, a state court's harmless error analysis. Accordingly, this Court should grant certiorari to secure a uniformity of decisions by clarifying whether this approach violates the principles of comity and federalism upon which AEDPA was based. *See Williams v. Taylor*, 529 U.S. at 436 ("AEDPA's purpose [was] to further principles of comity, finality, and federalism. There is no doubt Congress intended AEDPA to advance these doctrines.").

II.

THE NINTH CIRCUIT'S GRANT OF HABEAS RELIEF BASED MERELY ON ITS INDEPENDENT HARMLESS-ERROR REVIEW UNDER *BRECHT* CONTRAVENES THIS COURT'S RULE IN *MITCHELL V. ESPARZA* THAT SUCH RELIEF IS APPROPRIATE ONLY IF THE STATE COURT'S HARMLESS-ERROR REVIEW WAS APPLIED IN AN OBJECTIVELY UNREASONABLE MANNER

Under the AEDPA deference standard as it has developed over the last five years, it can now no longer be claimed that if a habeas petitioner is able to demonstrate an error was substantially injurious under *Brecht*, then it necessarily follows, that a state court reaching a contrary conclusion under *Chapman* unreasonably applied that decision. See, e.g., *Middleton v. McNeil*, 124 S. Ct. at 1832-1833; *Yarborough v. Alvarado*, 124 S. Ct. at 2149-2151; *Yarborough v. Gentry*, 540 U.S. at 4-6; *Lockyer v. Andrade*, 538 U.S. at 70-75; *Woodford v. Visciotti*,

537 U.S. at 21-26; *Early v. Packer*, 537 U.S. at 7-11; *Williams v. Taylor*, 529 U.S. at 436. That is, even if a federal court would independently have reached a different conclusion applying a higher threshold standard of review, it cannot be said that the state court decision was, therefore, "contrary to" or an "objectively unreasonable" application of this Court's precedent. If a state court has found federal constitutional error and then made a good faith application of the harmless-error standard announced by this Court in *Chapman*, the federal habeas court must first determine whether the state court's harmless-error determination was "contrary to" or an objectively "unreasonable application" of *Chapman* and, if so, then apply *Brecht*.

Under the requirements of AEDPA, a federal court "shall not" grant a writ of habeas corpus to a state prisoner with respect to any claim adjudicated on the merits in state court unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d); *Price v. Vincent*, 538 U.S. 634, 639-640 (2003). The phrase "clearly established Federal law, as determined by the Supreme Court of the United States refers to holdings, as opposed to dicta, of this Court's decisions as of the time of the relevant state court decision. *Williams v. Taylor*, 529 U.S. at 412. An adjudication is "contrary to" federal law if it fails to apply the correct controlling authority, or if it applies the correct controlling authority incorrectly to a case involving facts "materially indistinguishable" from those in the controlling decision. *Id.* at 405-406; *see also Early v. Packer*, 537 U.S. at 7-8.

A state court decision constitutes an "unreasonable application" of this Court's precedent if the state court identifies the correct governing legal rule from this Court's decisions, but unreasonably applies it to the facts of the petitioner's case.

Williams v. Taylor, 529 U.S. at 406; *see also Wiggins v. Smith*, 539 U.S. 510 (2003). In other words, a federal court may grant relief when a state court has misapplied a "governing legal principle" to a "set of facts different from those of the case in which the principle was announced." *Lockyer v. Andrade*, 538 U.S. at 76 (*citing Williams v. Taylor*, 529 U.S. at 407.) In order for a federal court to find a state court's application of this Court's precedent "unreasonable," the state court's decision must have been more than incorrect or erroneous. *Lockyer v. Andrade*, 538 U.S. at 75. The state court's application must have been "objectively unreasonable." *Williams v. Taylor*, 529 U.S. at 409. As this Court stated in *Mitchell v. Esparza*, "[a] constitutional error is harmless when 'it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."'" *Mitchell v. Esparza*, 540 U.S. at 17-18, *citing Neder v. United States*, 527 U.S. at 15 (quoting *Chapman v. California*, 386 U.S. at 24; *see also Delaware v. Van Arsdall*, 475 U.S. at 681.

In *Britt*, 404 U.S. at 227, this Court held that held that Britt himself was not entitled to a transcript because he had access to the court reporter who would have read-back any portion of his first trial upon his request as an "adequate substitute" to the transcript. *Id.* at 228. Here, the Ninth Circuit concluded the state court's decision was "contrary to" this Court's established precedent when it held that, in providing Kennedy with only a transcript of the prior testimony, the trial court "substantially complied" with *Britt* . App. A at 20a-21a, 24a-25a; App. C at 83a-84a, 87a-88a; *see* App. F at 153a. In a footnote, the Ninth Circuit alternatively concluded the state appellate court's holding was an objectively unreasonable application of *Britt*. App. A at 25a-26a n.13; App. C at 88a-89a n.13.

The Ninth Circuit stated that if the state had completely failed to provide an indigent defendant with a transcript of a mistrial for use on retrial, it would likely find structural error, requiring

automatic reversal. Where a portion of the transcript is provided, the Ninth Circuit concluded that a harmless error analysis applies. App. A at 26a; App. B at 89a. The Ninth Circuit then independently reviewed the record to conclude under *Brecht*, that the failure to provide a complete transcript had a "substantial and injurious" effect on the jury's verdict. App. A at 27a; App. C at 90a.

The Ninth Circuit, however, never analyzed whether the state appellate court's harmless-error analysis under *Chapman v. California* (App. F at 153a-154a), was objectively unreasonable as required by this Court's rule in *Mitchell v. Esparza*, 540 U.S. at 18. As a result, the Ninth Circuit found constitutional error and granted habeas corpus relief in a case where the state court's harmless error analysis under *Chapman* was never found to be "objectively reasonable."

In the present case, the state appellate court noted that Kennedy had available all those portions of the transcript which might have been necessary to impeach witnesses or to rebut evidence at the retrial. The state appellate court declined "to require per se reversal when, with defense counsel's acquiescence, the court provides an indigent defendant a transcript of all the trial testimony, but denies a later request for the additional portions of the transcript." App. F at 153a. The state appellate court also concluded that Kennedy had not shown that the trial court's denial of his request for the additional portions of the transcript was prejudicial. As an example of prejudice, Kennedy indicated that, prior to his first trial, his defense counsel requested that if Kennedy's statement to a police officer Mendez were mentioned, any gang reference be excised. Defense counsel asked that the prosecutor admonish Mendez not to "blurt it out" on the witness stand. The prosecutor stated that such was his intention and he had mentioned it to Mendez. He noted that this evidence could become relevant if Kennedy and Tucker minimized their

relationship with each other. The trial court ruled gang membership would not be mentioned, unless it became relevant during trial. On retrial, Officer Mendez did not testify. Detective McDowell, however, testified that after he gave Kennedy the $20, Kennedy said to Tucker, "Give it to him, cuz" and explained the term "cuz" was used by a lot of people, "but basically [by] gang members and those that [*sic*] want to be gang members." The prosecutor then questioned McDowell and suggested, as an alternative explanation, whether the term was used to refer to a person from one's own neighborhood, and McDowell agreed. The state appellate court concluded that the allusion to gang membership was itself not significant and Kennedy had not shown prejudice from not having the complete record. App. F at 153a-154a.

Instead of reviewing the state appellate court's harmless-error analysis, the Ninth Circuit embarked on its own independent review and construction of the record to determine if the error was harmless under *Brecht*. The Ninth Circuit relied on its concept of "social justice" to rule that if Kennedy's counsel on retrial had access to the transcript of pretrial proceedings, which included the motion to exclude gang-related evidence and the trial court's favorable ruling, it had little doubt that Kennedy's counsel in the second trial would have brought a similar motion. App. A at 47a-48a, 48a at n.7; App. C at 92a-93a; 93a n.16. The Ninth Circuit concluded that, under the general law of the case doctrine, the court on retrial would have been bound by the previous decision to exclude any gang testimony from Kennedy's mistrial, such that any motion by Kennedy to exclude such testimony would have had "a substantial likelihood of success." App. A at 52a-53a; App. C at 92a-93a. The State's petition for rehearing en banc, however, indicated an important legal flaw in the Ninth Circuit's assessment of prejudice in this case. The law of the case doctrine actually does not apply to trial court decisions in California. App. A at

53a, citing 9 Bernard E. Witkin, *California Procedure* § 896 at 930-31 (4th ed. 1997) (collecting cases).

Although the Ninth Circuit corrected these errors in its amended opinion, its finding of prejudice remained the same. As a dissent pointed out, it was not objectively unreasonable for the state appellate court to conclude that any constitutional error was harmless. *See* App. A at 53a.

The Ninth Circuit also stated in its prejudice analysis that the prosecutor had a distinct advantage in this case because he was present during all of the proceedings both before and during the first trial. App. C at 97a. According to the majority, the prosecutor took advantage of Kennedy's counsel's lack of knowledge of the prior trial court's order prohibiting testimony of gang involvement or association in order to deliberately elicit such testimony from Detective McDowell to establish Kennedy's guilt. App. C at 92a, 94a. The State's petition for rehearing en banc, however, revealed that *different* prosecutors handled Kennedy's two trials. As found by the dissent, the majority's *factual predicate was utterly baseless*. *See* App. A at 49a-50a.

Similarly, the Ninth Circuit's conclusion that the prosecutor deliberately elicited gang testimony from Detective McDowell was also faulty. In its decision, the state court noted that beyond Detective McDowell's statement that "a lot of people use ['cuz']," the *prosecutor* elicited an acknowledgment from McDowell that the term often refers to people from one's own neighborhood. App. A at 50a; App. C at 113a; *see* App. F at 154a. The dissenting judge stated that, it was perhaps for that reason that Kennedy's counsel *never objected* to McDowell's testimony regarding gang affiliation because, when considered in context, McDowell's "allusion to gang membership was not significant." App. A at 50a; App. C at 113a; App. F at 154a, 162a. Given the new prosecutor's efforts to minimize the

impact of the insignificant allusion to gang membership, and in light of the severe gaps in the majority's speculative claim of causation between any alleged *Britt* error and the introduction of gang evidence on retrial, it was not objectively unreasonable for the state appellate court to have concluded that any constitutional error was harmless. App. A at 53a.

There were other reasons to believe that McDowell's allegedly prejudicial statements did not impact the jury's determination that Kennedy had committed the charged offense. App. A at 53a; App. C at 115a. In addition to the detective's persuasive testimony regarding the circumstances of Kennedy's sale of a non-controlled substance in lieu of a controlled substance, Randall Tucker testified to delivering to McDowell the paper bag containing the non-controlled substance, although he denied his intent and any misrepresentation of its contents. As a result of that denial, the prosecutor then lawfully impeached Tucker with evidence that he had pled guilty to the very same offense at issue at Kennedy's trial. App. A at 53a; App. C at 115a. Given this powerful trial testimony suggesting Kennedy's guilt, it is difficult to think that the jury's verdict would have been different if McDowell had not been allowed to intimate that, among other completely innocuous meanings, the term "cuz" had gang significance. App. A at 54a; App. C at 115a.

In its readiness to attribute error to the state appellate court's decision, the Ninth Circuit ignored the AEDPA deference standard to find that a *Britt* error was substantially injurious under *Brecht*. By doing so, the Ninth Circuit directly contravened Court's rule in *Mitchell v. Esparza*, 540 U.S. at 17-18, that a state court's harmless-error analysis must be found to be "contrary to" or an objectively "unreasonable application" of this Court's precedent as a condition to federal habeas corpus relief.

CONCLUSION

Accordingly, the State respectfully requests a writ of certiorari to issue to the United States Court of Appeals for the Ninth Circuit.

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Respectfully submitted,

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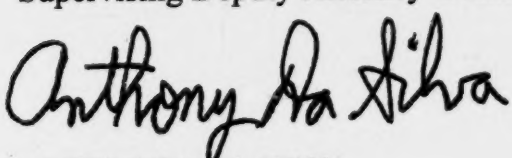

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